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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 278

THE CUDAHY PACKING COMPANY, A CORPORATION, APPELLANT,

vs.

JAY GRANT HINKLE, SECRETARY OF STATE, AND JOHN H. DUNBAR, ATTORNEY GENERAL, OF THE STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED JULY 16, 1928

(33,587)

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INDEX

	Original	Print
Record from the district court of the United States, Western Washington	2	1
Bill of complaint	2	1
Summons and marshal's return (omitted in printing)	20	
Order setting cause for hearing and affidavit of service.	22	19
Motion to dismiss	26	21
Decrees	27	22
Opinion, Cushman, J.	31	24
Concurring opinion, Dietrich, J.	46	38
Dissenting opinion, Bourquin, J.	51	42
Assignments of error	53	44
Petition for appeal	56	46
Order allowing appeal	58	47
Order fixing bond (omitted in printing)	59	
Bond on appeal (" " ")	61	
Citation and service (" " ")	64	
Præcipe for transcript of record	66	48
Clerk's certificate (omitted in printing)	68	
Statement of points to be relied upon and designation to print entire record	69	49

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[fols. a-2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

No. 330-E

THE CUDAHY PACKING COMPANY, a Corporation, Plaintiff,

vs.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington, Defendants

Complaint in Equity

BILL OF COMPLAINT—Filed Aug. 31, 1927

The plaintiff for a First Cause of Action in its petition and complaint alleges:

I

That The Cudahy Packing Company is a corporation organized and existing under and by virtue of the laws of the State of Maine, and no other state, and is domiciled and has its principal office and place of business in the City of Portland in said State of Maine, and is not now, nor has it ever been, a citizen of the State of Washington.

II

That the defendant, Jay Grant Hinkle, is a citizen of the State of Washington, an inhabitant of the Western District of Washington, a resident of the City of Olympia in the County of Thurston, and is the Secretary of State of the said State of Washington. That the defendant John H. Dunbar, is a citizen of the State of Washington, an inhabitant of the Western District of Washington, a resident of the City of Olympia in the County of Thurston, and is the Attorney General of the said State of Washington.

III

That this suit involves an unlawful regulation of interstate commerce, which deprives the plaintiff of property without due process of law and arises under a law regulating commerce known as the Interstate Commerce Act, and [fol. 3] that the value of plaintiff's right to do business in the State of Washington and the amount in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and cost.

IV

That this suit is brought for the purpose of restraining the defendants, in their respective official capacities, from enforcing against the plaintiff those laws of the State of Washington requiring foreign corporations doing business therein to secure a permit and pay the fees provided therefor, and to pay an annual franchise tax therefor, and providing penalties for failure to secure such permit and to pay such franchise tax, and providing for the enforcement of those penalties in part by the Secretary of State and in part by the Attorney General on the ground that those laws of the State of Washington conflict with the Constitution of the United States in that they take plaintiff's property without due process of law, regulate and burden its business of conducting interstate commerce, and deny to plaintiff the equal protection of the laws.

V

That the plaintiff is authorized by its charter: to purchase, deal in, and sell, cattle, hogs, sheep and other live stock, and animals used for food; to purchase for slaughter, and slaughter, prepare and pack, cattle, hogs, sheep and other live stock, and animals used for food, and to manufacture and dispose of the products thereof; to buy, sell, deal in, manufacture and dispose of, all articles and substances, necessary or incidental to, the manufacture or preparation of such products, or any by-products; to buy, sell, manufacture, and deal in, meats, provisions, and all classes of produce and packing house products; to buy, sell, prepare, preserve, manufacture and deal in, fruits, veg-

etables, foods and food stuffs of all kind whatsoever; to buy, sell, manufacture, and deal in, all articles of commerce made or prepared in whole or in part from the product of slaughter of, cattle, hogs, sheep or other live stock, or animals [fol. 4] used for food; to purchase, acquire, hold, own, lease, construct, maintain and use, all buildings, structures, machinery, apparatus, equipment, office, vehicles, cars, and agencies of every kind, nature and description, used or usable in the carrying out of any of the objects, purposes and businesses, aforesaid.

VI

That about forty years ago The Cudahy Packing Company, which was then largely engaged in the business of shipping its goods and merchandise from one state into another for sale and delivery and for delivery after sale, entered the State of Washington, selling its merchandise through traveling salesmen who took orders therefor and sent the orders to plaintiff's office at Chicago for acceptance and filling through shipment; and continuously since the plaintiff entered the State of Washington it has been engaged in interstate commerce between that state and other states of the Union, and has been actively engaged in interstate commerce between each and every one of the states of the American Union and in foreign commerce, shipping goods for sale, or after they have been sold, from the United States into Canada, Alaska and the Orient and other foreign countries.

VII

That at its principal office, as hereinbefore alleged, in the City of Portland, State of Maine, all of its corporate business, as distinguished from its mercantile and manufacturing business, is transacted; that the corporate meetings of the plaintiff are all held at the office at Portland; that its stock book is kept there, and all transfers of its capital stock are kept there, and the results of the plaintiff's business everywhere are assembled into accounts which are kept at Portland, which are the only books of account that disclose the results of all of plaintiff's business operations.

VIII

That besides its executive offices at Portland, the plain-[fol. 5] tiff, for the purpose of facilitating the transaction of its interstate business, as aforesaid, and its commerce with foreign nations, and in order that it may more conveniently serve those with whom it has transactions in such commerce, has established agencies in all of the states of the Union, and slaughter houses and packing houses in many of the said states of the Union, but it does not now, nor has it ever, maintained a slaughter house or packing house in the State of Washington, its only agency in the State of Washington being a warehouse and sales office which is located in the City of Seattle. That the only property of the plaintiff in the State of Washington consists of a lease on a warehouse and the refrigeration system and fixtures therein, the total value of which is about $40,000.00. That the plaintiff now employs in the State of Washington scores of salesmen who travel in and about the State of Washington soliciting orders for goods to be shipped directly from the plaintiff's packing plants in other states of the Union or from the warehouse at Seattle, none of whom take any orders for other goods save such as the plaintiff ships into the State of Washington direct to the purchaser or warehouses for the purpose of filling orders therefor.

That the stock of goods warehoused in the City of Seattle consists in the most part of original and unbroken packages of goods which the plaintiff has shipped into the State of Washington from its packing plants at Omaha, Nebraska; Kansas City, Missouri; Salt Lake City, Utah, and Los Angeles, California, which merchandise is in a large part reshipped and resold in original and unbroken packages in interstate and foreign commerce. That plaintiff's intrastate, interstate and foreign commerce are so inextricably interwoven that they cannot be separated.

IX

That plaintiff's gross sales for the year ending October 30th, 1926, amounted to $231,725,000.00, that of said sales $1,313,275.74 were made in the State of Washington, the other sales being goods sold and delivered in the other states and territories than the State of Washington with-

[fol. 6] out ever having come within the territorial boundaries of the State of Washington. That is to say, less than six-tenths of one per cent of the entire business of The Cudahy Packing Company for the year 1926 was done in the State of Washington. That more than one-half of all of the said sales made in the State of Washington were made in interstate and foreign commerce, and that more than one-half of all the merchandise handled by the plaintiff in its branch office in the State of Washington was resold in interstate commerce and in foreign commerce with Alaska, Canada, and practically all the countries of the Orient.

That the entire payroll of The Cudahy Packing Company for the year 1926 amounted to $15,952,066.78; that of said payroll $66,864.79 was earned in the State of Washington; that is to say, less than four-tenths of one per cent of the wages and salaries of plaintiff were earned in the State of Washington.

X

That The Cudahy Packing Company was duly and regularly incorporated in the State of Illinois and qualified for business in the State of Washington during the year 1890. That the said Cudahy Packing Company of the State of Illinois was succeeded by The Cudahy Packing Company, a Maine corporation, organized on the 7th day of October, 1915, and the said corporation qualified for business in the State of Washington on the 13th day of January, 1916, with a capital stock of $20,000,000.00. That the said Cudahy Packing Company duly and regularly filed supplemental articles with the Secretary of State of the State of Washington on the 20th day of May, 1919, authorizing an increase of capital stock to $35,000,000.00; since which date a further increase of the capital stock of The Cudahy Packing Company was authorized increasing the capital stock of said company to $45,000,000.00, but which supplemental articles have not been filed with the Secretary of State of the State of Washington.

XI

That at the time the plaintiff commenced doing business [fol. 7] in the State of Washington, and until the year 1897, no tax or fee was imposed upon either foreign or domestic

corporations, nor did either foreign or domestic corporations file certificates of increase or decrease of their capital stock in said state nor was there any requirement in the laws of said State that such certificates be filed therein.

By Chapter 70 of the Session Laws of 1897, which remained in effect until 1907, it was provided that any corporation having capital stock should pay the Secretary of State, for the use of the State, the sum of $10.00. By Chapter 140, Session Laws of 1907, which remained in effect until 1923, the same fee of $10.00 was imposed. By Chapter 144, Session Laws of 1923, the same fees for the filing of certificates of increase or decrease of capital stock were prescribed as those named in Sections 1 and 2, Chapter 149, Laws Extraordinary Session 1925, as hereinafter quoted, except that the proviso found in the act of 1925 limiting the total fee to $3,000.00, plus $10.00 for each separate instrument was omitted from the act of 1923. Until the year 1925 no law of the State of Washington required any corporation, either foreign or domestic, to file certificates of increase or decrease of their capital stock in any office of said State; the only requirement was that contained in Section 3853, Remington's Compiled Statutes of Washington, that every foreign corporation desiring to do business in the State of Washington should file a certified copy of its articles of incorporation, and the plaintiff, at the time of entering the State of Washington, fully complied with such requirement.

XII

In the year 1925, Section 1, Chapter 147, Session Laws of the State of Washington, Extraordinary Session 1925, was enacted amending Section 3853 of Remington's Compiled Statutes of Washington, and requiring each foreign corporation desiring to do business in the State of Washington to file in the office of the Secretary of State all certificates of increase or decrease of its capital stock.

Sections 1 and 2, Chapter 149, Laws of the State of Wash- [fol. 8] ington, Extraordinary Session 1925, provide:

"Section 1. That Section 3836 of Remington's Compiled Statutes, as amended by Section 1, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory of the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows:

Capital not exceeding $50,000.00, fee $25.00;

Capital of more than $50,000.00, and less than $100,000.00, fee $40.00;

Capital of $100,000.00, or more, and less than $150,000.00, fee $75.00;

Capital of $150,000.00, or more, and less than $200,000.00, fee $100.00;

Capital of $200,000.00, or more, and less than $300,000.00, fee $150.00;

Capital of $300,000.00, or more, and less than $400,000.00, fee $200.00;

Capital of $400,000.00, or more, and less than $500,000.00, fee $250.00;

Capital of $500,000.00, or more, and less than $1,000,000.00, fee $500.00;

Capital of $1,000,000.00, or more, and less than $2,000,000.00, fee $750.00; and $10.00 additional for each $1,000,000.00, or major fraction thereof, of capital stock in excess of $2,000,000.00: Provided, however, that the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.00.

Section 2. That Section 3837 of Remington's Compiled Statutes, as amended by Section 2, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificate of decrease of capital stock, shall pay to the sec-

retary of state a filing fee of $25.00. For filing of other amendatory or supplemental articles, it shall pay a fee of $10.00: Provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000.00, plus $10.00 for each separate instrument filed in addition to its original articles of incorporation."

XIII

That prior to the 30th day of June, 1926, the plaintiff, [fol. 9] desiring to comply with Chapter 147, Laws of Extraordinary Session 1925, appeared before the Hon. Jay Grant Hinkle, Secretary of State, and the Hon. William G. Potts, Treasurer of the State of Washington, and tendered the Secretary of State, for filing in his office, a certificate of increase of capital stock bringing the capitalization of the plaintiff up to $45,000,000.00, and at the same time tendered the Secretary of State and the State Treasurer the sum of $10.00 as a fee for the filing of said certificate, but the said plaintiff was notified by the said Secretary of State that the said certificate would not be accepted for filing unless and until plaintiff should pay the sum of $580.00, less the sum of $25.00 paid at the time of filing the original charter, and less the sum of $10.00 paid for filing one certificate of increase, or a total net fee of $5.00, computed according to said Chapter 149, Laws Extraordinary Session 1925.

XIV

That of plaintiff's authorized capital stock of $45,000,000.00 but $29,800,000.00 have been issued, and that all of its property wherever situated does not exceed in value the amount of its capital stock issued, surplus and undivided profits. That plaintiff pays State, County and City taxes to the respective municipalities, counties and states wherein it has property.

XV

By Section 3855 of Remington's Compiled Statutes of Washington it is provided that any foreign corporation doing business in the State of Washington which shall fail to comply with the provisions of Sections 3853 and 3854 of Remington's Compiled Statutes, as amended by Chapter 147, Laws of Extraordinary Session 1925, "shall be subject to a penalty of $250.00 to be recovered in a civil action to be instituted by the attorney general"; and by Section 3861 of Remington's Compiled Statutes of Washington it is provided that any agent of any foreign corporation conducting or carrying on business within the limits of this State, for and in the name of such corporation, contrary to the provisions of Chapter 189, Laws of [fol. 10] 1881, as amended by said Chapter 147, Laws Extraordinary Session 1925, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment.

XVI

When the plaintiff appeared, as aforesaid, before the Secretary of State and Treasurer for the purpose of filing its certificate of increase of capital stock it was informed by said officers that unless the plaintiff paid the fee of $545.00 demanded by them for the filing of said certificate the Secretary of State would refuse to accept said certificate for filing and the said officers would request the Attorney General of the State of Washington to institute a civil action against the plaintiff for the penalty prescribed by Section 3855 of Remington's Compiled Statutes, and to institute prosecutions against the agents of the plaintiff conducting or carrying on its business in the State of Washington under Section 3861 of Remington's Compiled Statutes.

XVII

That in addition to the scores of traveling salesmen, hereinbefore referred to, plaintiff has within the State of Washington, at its agency in Seattle, scores of employees

consisting of a manager, bookkeepers, stenographers, clerks and teamsters, and that the prosecution of all of said agents, under Section 3861 of Remington's Compiled Statutes, would utterly disrupt and ruin the plaintiff's business in said State.

XVIII

That the permit under which the plaintiff has heretofore operated in the State of Washington expired on the 30th day of June, 1926, and that the said officers have requested the Attorney General of the State of Washington to institute the aforesaid suits and the said Attorney General of the State of Washington, John H. Dunbar, is about to institute and bring suits as aforesaid. And the said officers have requested the prosecuting attorneys of the State of [fol. 11] Washington to file informations against plaintiff's agents, and they are about to have plaintiff's agents arrested.

For a second cause of action plaintiff complains and alleges:

I

Plaintiff realleges Paragraph I of its First Cause of Action.

II

Plaintiff realleges Paragraph II of its First Cause of action.

III

Plaintiff realleges Paragraph III of its First Cause of Action.

IV

Plaintiff realleges Paragraph IV of its First Cause of Action.

V

Plaintiff realleges Paragraph V of its First Cause of Action.

VI

Plaintiff realleges Paragraph VI of its First Cause of Action.

VII

Plaintiff realleges Paragraph VII of its First Cause of Action.

VIII

Plaintiff realleges Paragraph VIII of its First Cause of Action.

IX

Plaintiff realleges Paragraph IX of its First Cause of Action.

X

Plaintiff realleges Paragraph X of its First Cause of Action.

XI

That at the time The Cudahy Packing Company qualified to do business in the State of Washington no annual license fees were imposed by the said State of Washington upon either domestic or foreign corporations doing business in said State, and that no annual license fees were imposed until the year 1897, when by Chapter 70, Session [fol. 12] Laws of 1897, which remained in effect until 1907, an annual license fee of $10.00 was imposed upon every corporation having capital stock, thereafter the said annual license fee was increased to $15.00 by Chapter 140, Session Laws of 1907.

By Chapter 144, Session Laws of 1923, every corporation having its articles of incorporation on file in the office of the Secretary of State was required to pay certain annual license fees in proportion to its authorized capital stock at the same rates as those prescribed by Chapter 149, Laws Extraordinary Session 1925, on capital up to and including $2,000,000.00, but above $2,000,000.00 the annual license fee prescribed was $1.00 for each $1,000,000.00, or fraction

thereof, of authorized capital. That during this period the plaintiff paid an annual license fee of $183.00.

By said Chapter 149, Laws Extraordinary Session 1925, the license fee imposed upon foreign corporations having a capital stock above $2,000,000.00 was increased from $1.00 to $10.00 for each $1,000,000.00, or fraction thereof, but with the provision that the total amount of such annual license fee should in no case exceed $3,000.00.

That the plaintiff paid for the year 1926, under protest, an annual license fee of $480.00. That if the plaintiff is required or is compelled to file its supplemental articles increasing its stock to $45,000,000.00 it will be compelled to pay an annual license fee of $580.00.

XII

That in addition to the taxes paid the Secretary of State, as aforesaid, the plaintiff has annually paid all the State, County and City taxes assessed and levied against its property situate in the State of Washington, the taxes for the year 1926 amounting to $1575.67.

XIII

Section 3, Chapter 149, Session Laws of the State of Washington 1925, amending Section 3841 of Remington's Compiled Statutes, provides:

"Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized [fol. 13] capital stock, as follows:

Capital in excess of $50,000.00, and up to and including $100,000.00, Fee $25.00.

Capital in excess of $100,000.00, and up to and including $500,000.00, fee $50.00.

Capital in excess of $500,000.00, and up to and including $1,000,000.00, fee $100.00.

Capital in excess of $1,000,000.00, and up to and including $2,000,000.00, fee $150.00; and $10.00 for each $1,000,-

000.00 or fraction thereof of capital in excess of $2,000,000.00: Provided, however, That the total amount of such annual license fee shall in no case exceed $3,000.00. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents: Provided, however, That building and loan and savings and loan associations paying special fees provided for in the act under which same are incorporated shall not be required to pay the regular fees provided herein: Provided, further, That the annual fee required to be paid to the department of public works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act."

That these classifications are arbitrary and fanciful and deprive the plaintiff of equal protection of the law in that plaintiff's business and property both without as well as within the state are taxed while the other corporations are exempt as to their business and property beyond the state.

XIV

By Section 3842 of Remington's Compiled Statutes of Washington it is provided:

"That no corporation shall be permitted to commence or maintain any suit, action, or proceeding in any court of this state without alleging and proving that it has paid its annual license fee last due."

By the same Section it is provided:

"That failure upon the part of any corporation to pay its annual license fee for the period of one year from and after the date when such payment should become due shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation."

By said Section it is further provided that:

"It shall be the duty of the Secretary of State to strike from the records of his office the names of all corporations which have neglected for the period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records."

[fol. 14] By Section 3843 of Remington's Compiled Statutes of Washington, as amended by the Laws of 1923, Chapter 144, Section 5, and subsequent sections, it is provided that if a corporation whose name has been stricken from the records of the Secretary of State for failure to pay its annual license fee for two years may be reinstated at any time within three years after its name has been stricken from the records by paying to the Secretary of State all license fees and penalties then due from it and the additional sum of $10.00 for each and every year that its name has been stricken from the records, but that if within the period named such corporation shall have not made such application then the Secretary of State shall enter upon his records a notation that such corporation is dissolved and that it shall thereafter be dissolved and the trustees of such corporation shall hold the title to its property for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings.

XV

It is also provided by Section 3842 of Remington's Compiled Statutes of Washington that the State Board of Tax Commissioners may institute suits to enforce the payment of any license fee due from any corporation under the above mentioned laws.

XVI

That some time prior to the 30th day of June, 1927, the plaintiff appeared before the Hon. Jay Grant Hinkle, Secretary of State of the State of Washington, and the Hon. William G. Potts, Treasurer of the State of Washington, and demanded the issuance to the plaintiff of a license to

do business in the State of Washington for the year ending June 30th, 1928, and at the same time tendered to them the sum of $15.00, but the said officers, acting under the pretended authority of said Chapter 149, Laws Extraordinary Session 1925, declined and refused to issue to the plaintiff any license to do business in the State of Washington from and after June 30th, 1927, unless and until [fol. 15] the plaintiff should pay as a condition precedent to the issuance of such license, a fee of $545.00, for the filing of its certificate of increase of its capital stock and the sum of $580.00 as an annual license fee computed on the basis of said Chapter 149, Laws Extraordinary Session 1925. That the plaintiff was then and there informed by the officers that unless it paid the fee demanded by them the Secretary of State would refuse to issue to the plaintiff any license permitting it to do business in the State of Washington for the year commencing July 1st, 1927, and subsequent years, and would at the times fixed in the said laws above mentioned in this paragraph strike the plaintiff's name from the records of his office and enter thereon a notation of the plaintiff's dissolution as a corporation; and said officers further informed the plaintiff that it would be deprived, on and after the 1st day of July, 1927, of the right to commence or maintain any action, suit or proceeding in any court of the State of Washington, would be under a presumption of insolvency and under a constant threat and danger of receivership and in danger of the loss of its name to some other corporation thereafter organized.

XVII

That as heretofore alleged, any corporation whose right to do business shall be thus forfeited shall be denied the right to sue and defend in any of the courts of this State, except in a suit to forfeit the charter of such organization, and in any suit against such corporation on a cause of action arising before such forfeiture no affirmative relief shall be granted to such corporation unless its right to do business in this State shall be rivived. That the plaintiff cannot conduct business in the State of Washington without resort to the courts of said State because ninety-five per cent of all of its causes of action arising from the sale of its goods,

wares and merchandise, in the State of Washington are below the minimum jurisdiction of the Federal Courts and must be litigated, if at all, in the State Courts, and in addition thereto, the plaintiff is liable, at any time, to be sued in the State courts under such conditions as to the parties or as to the amount involved as it could not remove the con- [fol. 16] troversy to the Federal Court, and if its right to do business within the State if forfeited under the pretended laws, aforesaid, it can interpose no defense to such actions. That the plaintiff has no adequate remedy at law for its protection against the consequences of the enforcement against it of the said unconstitutional laws and will be without remedy unless it can secure such relief as only a court of equity can grant by way of injunction.

XVIII

That the plaintiff, as aforesaid. refused to pay the fee demanded for the filing of its certificate of increased capital and *id* then and there also refuses to pay the annual license fee demanded of it by the said State officers, and the said officers did, after the 1st day of July, 1927, notify the State Board of Tax Commisioners of the State of Washington of the delinquency of the plaintiff, and the State Board of Tax Commissioners, under the authority of the aforesaid Statute, through John H. Dunbar,. Attorney General, are threatening to institute suit against the plaintiff to enforce the payment of the license fee claimed by the aforesaid officers to be due from the plaintiff under the above mentioned law.

XIX

That the plaintiff will not apply to the Secretary of State for a permit to do business in the State of Washington, nor meet the conditions necessary for the success of such application, which are the payment of the fees aforesaid, nor will the plaintiff pay a franchise or annual license fee under said unconstitutional laws for the fiscal year ending June 30th, 1928. That Jay Grant Hinkle, Secretary of State, has informed the plaintiff that he is about to forfeit on the books of his office the right of the plaintiff to do business in the State of Washington and is about to bring this fact to the

attention of the plaintiff's debtors and to every person having a claim against the plaintiff and is about to issue a certificate to that effect to such persons, whereby the courts of the State will be closed to the plaintiff, his certificate being [fol. 17] made proof under the laws of Washington of facts so certified. And the said John H. Dunbar, as Attorney General, is already threatening to institute a suit or suits against the plaintiff for the collection of penalties for the non-payment of the franchise or annual license tax and to oust it from doing business in the State of Washington, and criminal actions are about to be instituted against all of the agents of plaintiff in the State of Washington, and the said defendants, acting under what they conceive to be their duties under said pretended laws, are harrassing, annoying and impeding the plaintiff in its just right to transact its interstate commerce in the State of Washington and the business inseparable therefrom, as aforesaid. That plaintiff will be deprived of its right to do its interstate business and the business incident thereto in the State of Washington in violation of its right guaranteed to it under the Constitution of the United States in Article 1, Section 8, Paragraph 4, which grants to Congress the power to regulate commerce with the foreign nations, among the several states, and with the Indian tribes; and under the 14th amendment to the Constitution of the United States, and the first section thereof, which guarantees the plaintiff against being deprived by any State of its property without due process of law, and against being denied the equal protection of the laws.

XX

That Roland H. Hartley is the duly elected and acting Governor of the State of Washington, and that he can be found in the City of Olympia, County of Thurston, in the Western District of Washington.

Wherefore plaintiff prays that the defendant, Jay Grant Hinkle, as Secretary of State, be restrained and enjoined, pending this suit, from undertaking in any manner to enforce against the plaintiff, or any of its officers, agents, or

stockholders, the permit or annual franchise tax laws of the State relating to foreign corporations and from making any entries in the books of his office signifying that the permit of the plaintiff to do business in the State of Washington has been forfeited, and from issuing any certifi-
[fol. 18] cates to any person whomsoever to the effect that the permit of this plaintiff to do business in the State of Washington has been forfeited; and that the defendant, John H. Dunbar, as Attorney General, be restrained and enjoined from attempting to in any wise enforce against the plaintiff the permit and annual license fee or franchise tax laws of the State of Washington relating to foreign corporations, and from instituting any suit for the collection of any franchise tax or annual license fees or penalties or any suit to cancel the permit of the plaintiff to do business in the State of Washington on the ground that it has failed to pay the annual fees required by the laws of the State of Washington for foreign corporations doing business therein, and from instituting any suit against the plaintiff to enjoin it from transacting business in the State of Washington based on the failure of the plaintiff to pay said permit fee or franchise taxes, and that said injunctions, on a final hearing, be perpetuated, and that the plaintiff recover from the defendants its costs, and for such other and further relief as it may be entitled to in the premises.

Plaintiff further prays that His Excellency, Roland H. Hartley, the Governor of the State of Washington, and each of the defendants have due notice of its application for an injunction herein, and that a subpœna issue to each of the defendants according to the practice in equity, requiring them and each of them to answer this bill, but not under oath, the oath of the defendants being hereby expressly waived; and as in duty bound plaintiff will ever pray.

The Cudahy Packing Company, by Palmer, Askren & Brethorst, E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Solicitors for Plaintiff.

[fol. 19] *Duly sworn to by E. B. Palmer. Jurat omitted in printing.*

[fols. 20 & 21] Summons and Marshal's return, filed September 3, 1927, omitted in printing.

[fol. 22] In United States District Court

[Title omitted]

Order Setting Cause for Hearing—Filed Sept. 19, 1927

The Bill of Complaint in foregoing cause having been this day presented to me, Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, and it appearing therefrom the same seeks an interlocutory injunction restraining the action of certain officers of the State of Washington in the enforcement or execution of certain statutes of the State of Washington, I have this day called to my assistance to hear and determine such application, the Honorable Frank S. Dietrich, United States Circuit Judge for the Ninth Circuit, and Honorable George M. Bourquin, United States District Judge for the District of Montana, and they having consented to serve in that capacity.

And it is thereupon ordered that the said application for interlocutory injunction, prayed for in the Bill of Complaint in this cause, be set down for hearing before the three Judges above named, in the United States District Court Room, at Tacoma, Washington, on Saturday, September 24th, 1927, at 10 o'clock A. M., or such time thereafter as it may be heard, and that notice of such hearing be given to each of the defendants in this cause and to His Excellency Roland H. Hartley, Governor of the State of Washington, by delivery to them and each of them of a certified copy of this order, in conformity with the provisions of [fol. 23] Section 266 of the Judicial Code of the United States.

In Chambers, at Seattle, Washington, this 19 day of September, 1927.

Edward E. Cushman, United States District Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERVICE—Filed June 6, 1928

STATE OF WASHINGTON,
County of King, ss:

E. B. Palmer, being first duly sworn, upon oath deposes and says:

That at all times herein mentioned I have been and am now a citizen of the United States and a resident of the State of Washington, over the age of twenty-one years, not a party to or interested in the above entitled action and competent to be a witness therein.

That on the 19th day of September, 1927, I received three certified copies of the order entered herein on the 19th day of September, 1927, fixing the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is hereto attached, and that on the 19th day of September, 1927, I duly served a certified copy of said order entered herein on the 19th day of September, 1927, giving notice of the hearing on plaintiff's petition for an interlocutory injunction upon His Excellency, Roland H. Hartley, he being Governor of the State of Washington and residing at Olympia, Washington, by delivering to and leaving with the said Roland H. Hartley, Governor of the State of Washington, personally, in the City of Olympia, State of Washington, a certified copy of the said original order entered herein on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is at-
[fol. 25] tached hereto.

That on the 19th day of September, 1927, I duly served the said order herein filed on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is attached hereto, upon Jay Grant Hinkle, Secretary of State and one of the defendants named in said action, by delivering to and leaving with said Jay Grant Hinkle, personally, in the City of Olympia, State of Washington,

a certified copy of the said original order entered herein on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is attached hereto.

That on the 19th day of September, 1927, I duly served the said order herein filed on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is attached hereto, upon John H. Dunbar, Attorney General of the State of Washington and one of the defendants named in said action, by delivering to and leaving with the said John H. Dunbar, personally, in the City of Olympia, State of Washington, a certified copy of the said original order entered herein on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is hereto attached.

E. B. Palmer.

Subscribed and sworn before me this 6th day of June, 1928. S. W. Brethorst, Notary Public in and for the State of Washington, Residing at Seattle, Wash. (Seal.)

[File endorsement omitted.]

[fol. 26] In United States District Court

[Title omitted]

Motion To Dismiss—Filed Sept. 20, 1927

Come now the defendants Jay Grant Hinkle, secretary of state, and John H. Dunbar, attorney general of the state of Washington, and each of them, by John H. Dunbar, attorney general, and L. B. Donley, assistant attorney general, their solicitors, and move the court to dismiss the complaint in equity filed herein for the reasons and upon the grounds that, as it appears upon the face thereof:

I

Said complaint in equity does not state any matters of equity entitling the plaintiff to the relief prayed for.

II

Said complaint in equity does not state facts sufficient to entitle the plaintiff to any relief against these defendants.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Solicitors for Defendants.

Service of the foregoing motion to dismiss by receipt of copy acknowledged this 19th day of September, 1927.

Palmer, Askren & Brethorst, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed May 8, 1928

This cause having come on regularly for hearing in this court on the 22nd day of September, 1927, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. E. B. Palmer, Thos. M. Askren, and S. W. Brethorst, its solicitors, and the defendants being represented by John H. Dunbarm, Esq., Attorney General of the State of Washington, and L. Donley, Esq., his assistant, their solicitors, and the Court having heart arguments of counsel and having considered the briefs of the respective parties and having on the 9th day of January, 1928, filed its written opinions;

Now, on this 28th day of April, 1928, the parties herein now appearing by their respective counsel, on the motion of the defendants, pursuant to such decision of the Court,

It is by the Court hereby ordered, adjudged, and decreed that said motion to dismiss be, and it is hereby granted upon the sole ground that the bill of complaint does not

[fol. 28] state facts sufficient to entitle plaintiff to any relief against the defendants; and that said bill of complaint and causes of action be and the same hereby are dismissed, and that the defendants have and recover their costs and disbursements herein, to which the plaintiff excepts and its exception is allowed.

Dated at San Francisco, May 3rd, 1928,

Frank S. Dietrich, Circuit Judge.

Dated at Tacoma, April 28, 1928.

Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed June 7, 1928

This cause having come on regularly for hearing in this court on the 22nd day of September, 1927, upon the plaintiff's petition for an interlocutory injunction, the plaintiff being represented by Messrs. E. B. Palmer, Thos. M. Askren and S. W. Brethorst, its solicitors, and the defendants being represented by John H. Dunbar, Esq., Attorney General of the State of Washington, and L. B. Donley, Esq., his assistant, their solicitors, and the Court having heard arguments of counsel and having considered the briefs of the respective parties, and having on the 9th day of January, 1928, filed its written opinions,

Now, on this 7th day of June, 1928, the parties herein appearing by their respective counsel, S. W. Brethorst, attorney for plaintiff, and L. B. Donley, Asst. Atty. General, on the motion of the defendants, pursuant to such decision of the Court, the Court having heretofore dismissed the bill of complaint,

It is by the Court hereby ordered, adjudged, and decreed that said petition of the plaintiff for an interlocutory injunction against the defendants be, and it is hereby, denied;

to which the plaintiff excepts and its exception is allowed. This order amends the decree and order of dismissal en-
[fol. 30] tered May 8th, 1928.

Dated this 7th day of June, 1928.

George M. Bourquin, District Judge, by Edward E. Cushman, District Judge. Edward E. Cushman, United States District Judge of the Western District of Washington, Southern Division. Judge Frank S. Dietrich, Circuit Judge.

Concurs in this order: Edward E. Cushman, District Judge.

OK as to form. John H. Dunbar, Atty. Gen., L. B. Donley, Asst. Atty. Gen., Solicitors for Defendants, John H. Dunbar, Atty. Gen., and J. Grant Hinkle, Sec. of State.

[File endorsement omitted.]

[fol. 31] In United States District Court

[Title omitted]

Palmer, Askren & Brethorst, Seattle, Attorneys for Plaintiff.

John H. Dunbar, Attorney General; L. B. Donley, Ass't, Olympia, Attorneys for Defendants.

Before Statutory Court: Dietrich, Circuit Judge, and Bourquin and Cushman, District Judges

Opinion—Filed Jan. 9, 1928

Cushman, (D. J.):

Plaintiff, a corporation, organized under the laws of the state of Maine, sues to enjoin the enforcement of the statutes of Washington requiring of corporations the payment of certain amounts of money, called in the Acts: the one "a filing fee" and the other an "annual license fee." While plaintiff asks an interlocutory injunction the matter is before the court upon motion to dismiss for want of equity and a failure of the bill to state facts entitling plaintiff to relief.

Complaint is made that these Acts in question will deprive plaintiff of property without due process of law, and that they deny to plaintiff equal protection of the law, and violate the Commerce Clause, Art. I, Sec. 8, Clause 3, of [fol. 32] the Constitution. It is alleged that plaintiff about Forty years ago engaged in business in the State of Washington and has since been engaged therein, in interstate and foreign commerce, that it has been actively engaged in interstate commerce between each and every one of the states, and foreign commerce; that its principal office is in the City of Portland, Maine, and that for the purpose of facilitating the transaction of its interstate business it has established agencies in all the states of the Union; that in Washington, its only agency is a warehouse and sales office; that its only property in Washington is a lease of a warehouse and refrigeration system and fixtures therein, which is of a total value of about $40,000.00; that none of its traveling salesmen take orders for goods, save such as plaintiff ships into the state direct to the purchaser or to its warehouse for the purpose of filling orders therefor; that its goods, warehoused in Washington consist in most part of original and unbroken packages shipped into the state and which are in large part, reshipped and resold in original and unbroken packages in foreign commerce; that its intrastate and interstate commerce are so inextricably interwoven that they cannot be separated; that of its goods sold in the year ending in October, 1926, less than 6/10 of 1 per cent of its entire business was done in the State of Washington, (In round numbers) its goods sold for such year being in excess of $231,000,000,—its Washington sales less than $1,325,000, and that more than one-half of its sales made in the State of Washington, and more than one-half of its merchandise handled in its branch office in Washington, were in interstate and foreign commerce; that less than 4/10 of 1 per cent of its wages and salaries paid were earned in the State of Washington, such amount being a little less than $67,000.00.

[fol. 33] Subsequent to 1919, plaintiff increased its capital stock from $35,000,000. to $45,000,000., of which authorized capital but $29,800,000.00 have been issued, and that all of its property does not exceed in value the amount

of its capital stock issued. The supplemental articles evidencing such increase have not been filed with the Secretary of State of Washington. Until the law of 1925, presently to be mentioned, no law of the State required the filing of a certificate of the increase or decrease of capital stock. Sections 1 and 2, Chapter 149 of the laws of the State of Washington, of the Extraordinary Session of 1925, (Laws of 1925, Page 417) amended Sec. 3836 and 3837 of Remington's Comp. Stat., to read:

Sec. 3836. " Every corporation incorporated under the laws of this state, or of any state or territory in the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows: * * * Capital of $1,000,000.00 or more, and less than $2,000,000.00, fee $750.00; and $10.00 additional for each $1,000,000.00, or major fraction thereof, or capital stock in excess of $2,000,000.00 provided, however, That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.00;"

Sec. 3837. "Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory of supplemental articles decreasing, or certificates of decrease of capital stock, shall pay to the secretary of state a filing fee of $25.00. For filing of other amendatory or supplemental articles, it shall pay a fee of $10.00, provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000,000.00, plus $10.00 for each separate in-

strument filed in addition to its original articles of incorporation * * *."

[fol. 34] Chapter 147 of the laws of the Extraordinary Session (Laws of 1925, Page 410) amended Sec. 3853 of Remington's Comp. Stat., to read as follows:

"Such corporation shall cause to be filed in the office of the secretary of state * * * and a certified copy of each and all of its certificates of increase of its capital stock."

Sec. 3855 provides:

"Any foreign corporation doing business in this state which shall fail to comply with the provisions of the two preceding sections, shall be subject to a penalty of two hundred and fifty dollars to be recovered in a civil action to be instituted by the attorney general in the name of the state of Washington, upon his being furnished with a sworn statement of facts sufficient to justify such action."

Sec. 3861 provides:

"Any agent of any foreign corporation, conducting or carrying on business within the limits of this state, for and in the name of such corporation, contrary to any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment."

It is alleged that in 1926, plaintiff tendered the Secretary of State for filing, its certificate of increase of capital stock together with a filing fee of $10.00, which was refused, the Secretary demanding $580.00 less $35.00 in fees already paid. It is to be inferred that such demand was made under the foregoing provisions of law.

It is alleged that plaintiff has scores of traveling salesmen in the State of Washington and scores of other employes; that plaintiff upon refusing to pay the filing fee provided for by Chapter 149, was informed by the Secretary of State and State Treasurer of the State of Washington, that unless paid they would request the Attorney

General to institute a civil action against plaintiff under [fol. 35] Sec. 3855, supra, and to prosecute the agents of plaintiff carrying on business in the State, under Sec. 3861, supra, and that such suits are about to be brought. It is alleged that the prosecution of such agents would ruin plaintiff's business in the State.

Sec. 3 of Chap. 149 of the laws of the Extraordinary Session of 1925, (Laws of 1925, Page 418), amended Sec. 3841 of Remington's Comp. Stat., to read as follows:

"Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized capital stock, as follows: * * * Capital in excess of $1,000,000.00 and up to and including $2,000,000.00, fee $150.00; and $10.00 for each $1,000,000.00 or fraction thereof of capital in excess of $2,000,000.00: provided however, That the total amount of such annual license fee shall in no case exceed $3,000.00. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of State, for the use of the state, in addition to said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents; * * *"

Sec. 3842, Remington's Comp. Stat., provides:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due. * * * The state board of tax commissioners may institute suits to enforce the payment of any license fee, due from any corporation under this or any other law. Failure upon the part of any corporation to pay its annual license fee for a period of one year, from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be

shown by the state or by any private person or corporation; * * * It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records; * * *."

Sections 3843 and 3844 as amended by Chapter 144 of the Laws of Washington of 1923, Secs. 5 and 6, (Laws of 1923, [fol. 36] Page 465) provided for reinstating within three years of a corporation whose name has been stricken from his records, by the Secretary of State, and the conditions upon which it may be so reinstated.

Sec. 3846 provides:

"Every corporation whose name has been or shall hereafter be, stricken from the records of the office of the Secretary of State in pursuance of law for failure to pay its annual license fee for two years, is hereby authorized and permitted to apply to the Secretary of State for reinstatement at any time within three years after its name has been stricken from the records of the office of the Secretary of State. Any corporation stricken from the records and dissolved, as provided in this chapter, may at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation, and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up its affairs, such method of procedure is hereby validated and approved."

It is alleged that in 1927, plaintiff tendered to the Secretary of State, and State Treasurer, $15.00 and demanded a license to do business in the State of Washington, but that these officers acting under Chapter 149, supra, refused such license unless plaintiff pay for filing its certificate of increase a fee of $545.00 and the annual license fee of $580.00; that upon refusal of plaintiff to pay the annual license fee said state officers informed plaintiff unless the same was

paid, 'the Secretary of State would refuse to issue to the plaintiff any license permitting it to do business in the State of Washington for the year commencing July 1st, 1927, and subsequent years, and would at the times fixed in the said laws above mentioned in this paragraph strike the plaintiff's name from the records of his office and enter thereon a notation of the plaintiff's dissolution as a corporation; and said officers further informed the plaintiff [fol. 37] that it would be deprived on and after the 1st day of July, 1927, of the right to commence or maintain any action, suit or proceeding in any court of the State of Washington, would be under a presumption of insolvency and under a constant threat and danger of receivership and in danger of the loss of its name to some other corporation thereafter organized'. That said officers have notified the State Board of Tax Commissioners under the authority of the aforesaid Sec. 3842, of the delinquency of plaintiff, and said Board through the Attorney General is threatening suit to enforce the payment of such license fee. That the Secretary of State has informed plaintiff that he is about to forfeit, on the books of his office, the right of plaintiff to do business in the State, and to advise plaintiff's debtors and those having claims against it of that fact, and is about to issue a certificate to that effect to such persons, and that the Attorney General is threatening to institute suits against plaintiff for penalties for nonpayment of its license tax,—to oust it from doing business in the State of Washington, and commence actions against all of plaintiff's agents in the State; that this will deprive plaintiff of its right to do interstate business and business incidental thereto in the State of Washington.

Plaintiff cites: Hanover Fire Ins. Co., v. Carr, 272 U. S. 494; Western Union Tel. Co., v. Kansas, 261 U. S. 1; Pullman Co. v. Kansas, 216 U. S., 56; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147; Air-Way Electric Appliance Corp., v. Day, 266 U. S., 71; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203; Ludwig v. Western Union Tel. Co., 216 U. S. 146; Atchison etc., Ry. Co., v. O'Connor, 223 U. S. 280; International Textbook Co. v. Pigg, 217 [fol. 38] U. S. 91; Bucks Stove & Range Co. v. Vickers, 266 U. S. 205; Baltic Mining Co. & White Dental Mfg. Co. v. Massachusetts, 231 U. S. 68; Looney v. Crane Co., 245 U. S.

178; International Paper Co. v. Massachusetts, 246 U. S. 135; Roberts & C. Co v. Emmerson, 271 U. S. 50; O'Gara Coal Co. v. Emerson, 156 N. E. (Ill.) 814; Perkins Mfg. Co. v. Jordan, 254 Pac. (Cal.) 551; Smith v. Reeves, 178 U. S. 436; Exparte Young, 209 U. S. 123; Western Union Tel. Co. v. Andrews, 216 U. S. 165; Meyer v. Wells Fargo Co., 233 U. S. 298; Adams Express Co. v. New York, 232 U. S. 14; Indiana Mfg. Co. v. Koene, 188 U. S. 681; State Ex Rel Barber Co. v. Hinkle, 138 Wash. 72; Lamont Corliss & Co. v. Hinkle, 136 Wash. 285; Bank of Kentucky v. Stone, 88 Fed. 383; Barrett v. New York, 232 U. S., 14;

In addition to a number of the foregoing, the defendant cites: Great Northern Ry. Co. v. Stevens Co., 106 Wash. 238; Dowe v. City of Chicago, 78 U. S. 108; Grand Chute v. Winegar, 82 U. S. 373; Hannewinkle v. Georgetown, 82 U. S. 547; State R. R. Tax Cases, 92 U. S. 575; Shelton v. Platt, 139 U. S. 591; Allen v. Pullman Car Co., 139 U. S. 658; Pittsburg Etc. Ry. Co. v. Board of Public Works, 172 U. S. 32; Arkansas Bldg. & Loan Ass'n. v. Madden, 175 U. S. 269; Cruickshank v. Bidwell, 176 U. S. 73; Boise Artesian Water Co. v. Boise, 213 U. S. 276; Dalton Add. Machine Co. v. State Corp. etc., 236 U. S. 699; St. Louis & S. W. Ry. Co. v. Arkansas, 235 U. S. 350; Kansas City Etc., Ry. Co. v. Stiles, 242 U. S. 111; Virginia Signal Co. v. Virginia 246 U. S. 500; Locomobile Co. of America v. Massachusetts, 246 U. S. 146;

Plaintiff's case comes to this: Unless the case of Baltic Mining Co. v. Massachusetts. and the White Mfg. Co. v. Massachusetts, 231 U. S. 68, often spoken of as the Baltic Mining Co. case have been overruled in so far as they would apply to a case such as the present, plaintiff cannot prevail. [fol. 39] It is contended that the case is overruled by the following: Looney v. Crane Co., 245 U. S. 178; International Paper Co. v. Massachusetts, 246 U. S. 135, Cheney Bros. Co. v. Massachusetts, 246 U. S. 147; Air-Way Elec. Appliance Corp. v. Day, 266 U. S. 71; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203; Hanover Fire Ins. Co. v. Carr, 272 U. S., 494.

First, the contention is that the Baltic Mining Co. case, in which the excise tax measured by the authorized capital stock with a maximum of $2,000.00 was upheld, in a suit by a foreign corporation engaged in interstate and intrastate

business in the taxing state, has been expressly overruled by Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203. In the latter case the court said:

"It must now be regarded as settled that a State may not burden interstate commerce or tax property beyon*f* her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of the Baltic Mining Co. v. Mass. 231 U. S. 68,87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

The Alpha Portland Cement Company was engaged solely in interstate commerce, and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision, the particular point considered should always be borne in mind. The court called attention to this subject in the Baltic Mining Co., and S. S. White Mfg. Co. v. Commonwealth of Massachusetts:

Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases."

[fol. 40] In the case of Air-Way Corp. v. Day, supra, there was no maximum fixed for the annual license fee; the brief of appellant, page 73 of the report, shows that the attack upon the law was because there was not a reasonable limitation in the maximum amount of this fee. The appellant in that case besides using property owned by it in the state upon which it paid a general property tax, did an annual intrastate business amounting to $70,802.30; for the right of doing which business the lower court upheld an annual fee of $14,926., being about 21 per cent of

the intrastate business done. Consideration was given by the Supreme Court to the amount of this charge; the court in reversing the lower court saying:

"The fee determined by the lower court, as well as that fixed by the State officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed; it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on value of the privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. Southern Gum Co. v. Laylin, 66 Ohio St. 578. That value depends on the 'property owned and used and business transacted' in Ohio. Sec. 8728-11."

In the instant case, for the right to do an annual intrastate business transacted becoming a burden upon plaintiff's interstate business than was true in the foregoing case.
an annual license fee of $580.00 It is obvious, other things being equal, that there is far less danger of such a fee or tax,—less than 1/10 of 1 per cent,—upon the intrastate business than was true in the foregoing case.
[fol. 41] In Cheney Bros. Co. v. Massachusetts, 246 U. S., 147, the act regulating the amount of an excise tax for doing business by the par value of its authorized capital stock with a maximum of $2,000 upon such tax, the same sections of the Massachusetts law were considered by the court that it had considered in the Baltic Mining Company case, and were held valid as to those corporations doing both local and interstate business and void as to a company solely engaged in interstate business. Of one of the companies doing an interstate and local business, it was said:

"This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from

retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the State regardless of the motive with which it is conducted."

In International Paper Co. v. Massachusetts, 246 U. S., 135, a statute of Massachusetts removing such $2,000.00 limit on the maximum amount of such excise tax was held invalid, the suit being one by a foreign trading corporation largely engaged in interstate commerce, and whose business and property was largely in other states.

In this case, the court said of the Baltic Mining Company case:

"In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in Baltic Mining Co. v. Massachusetts and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in Looney v. Crane Company. True, the tax sustained in Baltic Mining Co. v. Massachusetts was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of tax which as shown in that and other cases, was a material factor in the decision."

[fol. 42] In Looney v. Crane Co., 245 U. S., 178, a Texas statute imposing upon corporations permit charges and excise taxes, both charges being without a maximum fixed as to their amount, in a suit by a foreign trading corporation engaged largely in interstate business, was held invalid. This case follows the rule laid down in Western Union Telegraph Co. v. Kansas, 216 U. S., 1; Pullman Co. v. Kansas, 216 U. S., 56; Ludwig v. Western Union Telegraph Co., 216 U. S., 146; International Textbook Co. v. Pigg, 217 U. S., 91; A., T. & S. F. Ry. Co. v. O'Connor, 223 U. S., 280, 285.

Of cases including the Baltic Mining Company case, the court in Looney v. Crane Company said:

"But despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. Baltic Mining Co. v. Massachusetts, 231 U. S., 68; St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S., 350; Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas, 240 U. S., 227; Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S., 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the case relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases."

The court held that the Baltic Mining Company case and other cases mentioned by it, did not overrule the Western Union Telegraph Co., and other cases. It follows that the cases relied upon as overruling the Baltic Mining Co. case, unless they go farther than the earlier cases, do not do so. Hanover Fire Ins. Co. v. Harding, 272 U. S., 494, has no bearing upon the present question.

In the case of Roberts and Schaefer Co. v. Emerson, 271 [fol. 43] U. S., 50:,—the Baltic Mining Company case was not mentioned, furthermore, that was a domestic corporation doing a purely intrastate business and the tax attacked was upheld. The court said:

"We cannot say that the value of the corporation franchise may not be measured by the number of no-par shares which may be issued rather than their value when issued."

The Supreme Court has also said, in Hump Harpin Co. v. Emerson, 258 U. S., 290:

"While a state may not use its taxing power to regulate or burden interstate commerce (United States Express Co. v. Minnesota, 223 U. S., 335; International Paper Co. v.

Massachusetts, 246 U. S., 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce), that the principle of the cases so holding must be regarded as a settled exception to the general rule. Maine v. Grand Trunk Ry. Co., 142 U. S., 217; Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S., 279; Flint v. Stone Tracy Co., 220 U. S., 107; United States Express Co. v. Minnesota, 223 U. S., 335; Baltic Mining Co. v. Massachusetts, 231 U. S., 68; Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S., 111; United States Glue Co. v. Oak Creek, 247 U. S., 321, 326-327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

In Perkins & Co. v. Jordan, 254 Pac., 551, where there was a maximum to the amount of the license fee fixed by the statute, in a suit by a foreign corporation engaged in interstate and intrastate business, the Supreme Court of the State of California held a statute fixing such tax upon the basis of the authorized capital stock of the corporation invalid, as violating the Commerce Clause and the Fourteenth Amendment, the court saying of the Baltic Mining [fol. 44] Company case:

The so-called Baltic-Dental Case (Baltic Mining Co. and S. S. White Mfg. Co. v. Commonwealth of Massachusetts, 231 U. S., 68, 34, S. Ct. 15, L. Ed., 127) has in some respects been distinguished and in other respects definitely overruled. See Looney v. Crane Co., supra, and Alpha Portland Cement Co. v. Mass., supra."

The Supreme Court of the State of Washington in two decisions in mandamus proceedings, involving the Act of 1923, has held the annual license fee valid. Lamont, Corliss & Co. v. Hinkle, 136 Wash., 285; State Ex Rel Barber Co. v. Hinkle, 138 Wash., 72. These decisions were made upon the authority of the Batlic Mining Company case,—136 Wash., 291. The Supreme Court of Washington in this case says:

"Counsel for the petitioner relies principally upon the following decisions: Western Union Tel. Co. v. State, 216 U. S., 1; Pullman Co. v. State ex rel Coleman, 216 U. S., 56; Ludwig v. Western Union Tel. Co., 216 U. S., 146; Looney v. Crane Co., 245 U. S., 178; International Paper Co. v. Commonwealth of Massachusetts, 246 U. S., 135; Cheney Brothers Co. v. Commonwealth of Massachusetts, 246 U. S., 147; Airway Electrical Appliance Corporation v. Day, 266 U. S., 71; Ozark Pipe Line Corporation v. Monier, 266 U. S., 555; Mulford Co. v. Cury, 163 Cal., 276; 125 Pac., 236; Hirschfeld v. McCullagh, 64 Ore., 502, 127 Pac., 541, 130 Pac., 1131. In every one of these cases except the latter it seems plain that the controlling consideration inducing the court to hold the tax unconstitutional was the fact that it unduly burdened interstate commerce. In the last cited decision the Oregon court does not make it plain as to whether or not there was there involved a question of a tax burden upon interstate commerce, but it seems apparent from the authorities cited in support of its holding that its conclusion was rested wholly upon decisions of the Federal supreme court and of the California supreme court, all of which had to do with the question of a tax unduly burdening interstate commerce. We think the Oregon decision is not persuasive in support of the due process of law contention here made on behalf of Petitioner."

The effect of the foregoing decisions is, that where the maximum excise fixed by the law does not itself appear to be unreasonable in amount, and the method of its computation ignores as a basis intrastate commerce and takes for [fol. 45] that purpose the amount of the authorized capital stock that fact alone is not sufficient to invalidate the tax; but that the result, the excise demanded under the statute, must bear no reasonable relation to the intrastate busi-

ness transacted before such is the effect. It is a well known rule of law, even where there is a positive statutory prohibition of restraint of trade, that all restraint is not prohibited.

No righteous cause for complaint is stated in the bill, for it fails to show any such substantial burden imposed by these statutes upon the interstate commerce of plaintiff, or such taking of its property or such discrimination as to warrant the Court in enjoining the collection by the state officers of the fees demanded.

The motion to dismiss will be granted upon both of the grounds upon which it is made.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONCURRING OPINION—Filed Jan. 9, 1928

Opinion by DIETRICH, C. J., concurring:

Defendant's first contention is that there is no basis for equitable relief for the reason that plaintiff has a plain, speedy, and adequate remedy at law, in that it could pay the demanded charges under protest and then bring an action to recover them, citing Great Northern Ry. Co. vs. Stevens County, 108 Wash. 238, 183 Pac. 65 in support of the view that such a course is available. If it be assumed that the averments of the bill do not bring the case within the reach of the rule recognized in ex parte Young 209 U. S. 123, Ludwig vs. Western Union Tel. Co., 216 U. S. 146, Adams Express Co. vs. City of New York, 232 U. S. 14, Ohio Tax Cases 232 U. S. 576, 587, Looney vs. [fol. 47] Crane Co., 245 U. S. 178, and Air-Way Co. vs. Day, 266 U. S. 71, 79, I am nevertheless of the opinion that the suit is cognizable in equity. "The remedy at law to be adequate must be a remedy at law in the Federal Court where jurisdiction in equity is sought * * * . It is not enough that there be a remedy at law in the State courts * * *." Simpkin's Fed. Proc., p. 275. And see

also Montgomery's Manual of Federal Jurisdiction (3d Ed.) See 702, 21 C. J. 42, sec. 17, Smyth vs. Ames, 169 U. S. 466, C., B. & Q. R. R. Co. vs. Osborne, 265 U. S. 14, Risty vs. Ohio R. I. P. R. Co., 270 U. S. 378, Franklin vs. Nevada-California P. Co. (9th C. C.), 264 Fed. 643. The Washington case, supra, was brought against a county. Payment here would have to be made to the State and any action for recovery must be against the State. But without its consent the State of Washington cannot be sued in its own courts and under the Eleventh Amendment to the Constitution of the United States it is exempt from suit in the federal courts. The only pertinent consent that has come under my notice is found in Sec. 886 Rem. Comp. Stat., Washington, which provides that, "Any person or corporation having any claim against the State of Washington shall have a right of action against the State, in the Superior Court of Thurston County." Within the principles above explained the restricted privilege thus conferred falls far short of providing an adequate remedy at law.

I find no substantial ground for holding invalid the provision involved in the first cause of action under which plaintiff is required to pay an initial or filing fee of $1,180, less certain credits. Without the consent of the State, foreign corporations cannot do business therein, and they may be arbitrarily excluded. Subject to the qualification that such corporations cannot be required to relinquish rights secured to them by the Constitution of the United States, the State may impose upon the privilege of entering its borders and transacting business therein such conditions as it sees fit. The rule is clearly stated in Hanover Ins. Co. vs. Harding, 272 U. S. 494, 507, together with illustrative exceptions. The case here is not thought to fall within the range of the qualifications. The fee is not intended to be a burden upon interstate commerce or a tax upon property beyond the jurisdiction of the state. It is in fact a relatively small burden and does not purport to have any relation to the amount of interstate busi- [fol. 48] ness transacted, and in fact bears none. It is a single charge for the privilege of entering the state and there exercising its corporate functions in the transaction of intrastate business, for an indefinite period. It is im-

posed alike upon all corporations transacting business in the state, including those which have no interstate transactions at all. True any exaction from a corporation engaged in both intrastate and interstate business may be said to affect the latter, but by engaging in both classes the corporation cannot in effect nullify the power of the state respecting the class which is otherwise admittedly subject to its control. If, as seems to be conceded, the state would have the power to require outright of all foreign corporations payment of such a fee in the amount of $1,180, why should we regard as invalid a law which less arbitrarily seeks to relate the fee to the magnitude and value of the privilege conferred. Touching the objection that authorized but unissued stock is not a reasonable factor to be considered, it is to be noted that the license secured upon the payment of the fee is for all time and under it the corporation may without further payment employ its entire authorized capital. True the power to issue stock is derived from the state where the corporation is organized, but the right to use the proceeds of stock so issued in carrying on business in another state is the grant of that state. Were issued stock adopted as the measure of the charge the corporation might issue but a nominal amount, procure entrance in a foreign state upon that basis, and thereupon issue all of its authorized capital stock, thus evading the payment of an adequate fee. But however that may be, the measure, though imperfect in operation, as are all systems of taxation and license, is more equitable than a uniform charge for all corporations, which the legislature had the power to impose. And, it may be added, the plaintiff does not suggest a more reasonable substitute.

Because of certain distinct considerations the validity of the tax assailed in the second cause of action is not so free from doubt. To escape the charge that it is an unwarranted burden upon interstate commerce or a tax upon property without the jurisdiction of the state, it should bear some reasonable relation to the extent of the intra- [fol. 49] state business and the value of the right to transact such business; and when available a standard should be adopted in harmony with that idea. These taxes are collected annually and there would seem to be no substantial reason, other than that of convenience, why they should

not be computed on the volume of actual intrastate business for the current year. However, as noted in the opinions of my associates the question in various aspects has frequently been considered by the Supreme Court and we are to find guidance in its decisions. In the analysis of these decisions by Judge Cushman, and in his conclusion I concur with some additional comments. Admittedly under the doctrine of the Baltic Mining Co. case the Washington statute is valid. In the nine cases arising in Massachusetts and decided four years later, reported as International Paper Co. vs. Mass., 246 U. S. 135, Locomobile Co. vs. Mass., 246 U. S. 146, and Cheney Brothers Co. et al. vs. Mass. (7 cases), 246 U. S. 147, clearly the doctrine of the Baltic case is not overruled or qualified but reaffirmed. In the Paper Company and the Locomobile cases the taxes were held invalid for the reason alone that prior to their imposition the State statute had been amended by removing therefrom the maximum limit of the exaction; and in the Cheney case, because the plaintiff was engaged exclusively in interstate business. In the other six cases where the corporations were engaged in both classes of business and the statute had not been amended prior to the imposition of the tax, the court, following the rule of the Baltic case, denied relief. The court regarded the presence or absence of a reasonable maximum or the fact that the corporation was engaged exclusively in interstate business as a controlling consideration. In the Air-Way corporation case (266 U. S. 71) apparently the statute provided no maximum and in other respects was unlike the Washington law. That the rule of the Baltic case was not thought to be involved is to be inferred from the fact that neither party cited it upon any substantive issue and it is not referred to in the opinion. In the Alpha Cement case (268 U. S. 203), after explaining the issue the Court thus stated the question for decision: "May the State impose upon a foreign corporation which transacts only interstate busi- [fol. 50] ness within her borders an excise tax measured by a combination of two factors—the proportion of the total value of capital shares attributed to transactions therein and the proportion of net income attributed to such transactions;" adding that, "Cheney Brothers Co. vs. Massa-

chusetts, 246 U. S. 147, 153, 154, necessitates a negative reply." And in summing up its decision the Court further said: "The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Brothers Co. vs. Massachusetts and cannot be enforced against a foreign corporation which does nothing but interstate business within the State." It will thus be seen that the decision was regarded as being strictly within the rule of the Cheney Brothers case, but, as we have seen, that case cannot be deemed out of harmony with the Baltic case for the reason that in the six other cases decided at the same time the Court expressly applied without qualification or limitation, the doctrine of the Baltic case.

I therefore concur in Judge Cushman's general conclusion.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

DISSENTING OPINION—Filed Jan. 9, 1928

BOURQUIN, D. J.:

I dissent. Although the majority makes out a case of reasonableness in respect to the amount of the tax, it is believed the impost contravenes a principle which may be found threading the maze of Supreme Court opinions with a fair degree of consistency, perhaps greater consistency than any other.

Therein, settled and clear principles are few. The court itself has said that they are of "difficult" formulation, and that "every case must be decided upon its own facts,"—a comforting refuge if not alibi in times of legal stress. And that principle is that "a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State."

International etc. Co. v. Mass., 246 U. S. 141;
Union etc. Co. v. Mass., 249 U. S. 282;
Alpha etc. Co. v. Mass., 268 U. S. 218.

In application of said principle, the court has decided that as the property represented by capital stock in excess of that used in the State, is property outside the State, such excess is not taxable by the State.

Airways, etc., v. Day, 266 U. S. 32.

That is the case at bar. The tax is within the ban of the due process clause of the Constitution, and when levied upon a corporation engaged in interstate commerce, within that of the commerce clause as well. Moreover the tax also upon authorized but unissued stock, is unequal and contrary to the Fourteenth Amendment.

[fol. 52] Airways Case, supra.

It is true that in Roberts etc. Co. vs. Emmerson, 271 U. S. 50, it is said that a State may tax a domestic corporation upon its unissued stock. But in that case, the corporation was the creature of the State, all its property was within the State, all its stock was issued, and it was not engaged in interstate commerce,—a radically different case from this at bar, invoking very different principles. Its general expressions, more or less dicta, must be read in the light of its peculiar facts, and not be taken as modifying the Airways Case. It is equally true that in Baltic etc. Co. v. Mass., 231 U. S. 68, a tax on the authorized capital stock of a foreign corporation, far in excess of property within the State, was upheld; for that (1) the tax was subject to a statutory limit of $2,000, (2) the amount was small when contrasted with that in Western etc. Co. v. Kan., 216 U. S. 1, and (3) it was "not void because imposed upon property beyond the State's jurisdiction." At least the second and third of these reasons, however, are overruled in Alpha etc. Co. v. Mass. supra, and the first, if not overruled, has no legitimate justification. It is an excuse rather than a reason.

For in that case as in this at bar, the limit avails nothing to the corporation, is not attained, despite it the tax is as great as if — was no limit, and none the less is a tax upon property beyond the State's confines. And in principle and by implication, the Alpha Case overrules said first reason.

It is noted that considerable water has run under the bridge since the Baltic Case, and the latter is little more than a relic of a period of spirit and tendencies quite dif-

ferent from today's, that spirit and tendencies to which all courts are more or less responsive.

The motion to dismiss ought to be denied, and the injunction granted.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 7, 1928

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the order made by this Honorable Court on the 8th day of May, 1928, and the decree of June 7, 1928, amending the same:

I

That the Court erred in denying the petition of the plaintiff for an interlocutory injunction.

II

That the Court erred in sustaining the motion interposed by the defendants to dismiss the bill of complaint in this cause upon the ground that said bill of complaint does not state facts sufficient to entitle the plaintiff to any relief against the above named defendants.

III

That the Court erred in sustaining the motion interposed by the defendants to dismiss the first cause of action set forth in the bill of complaint in this cause upon the ground that the said first cause of action does not state facts sufficient to entitle the plaintiff to any relief against the above named defendants.

[fol. 54] IV

That the Court erred in sustaining the motion interposed by the defendants to dismiss the second cause of action set forth in the bill of complaint in this cause upon the ground that the said second cause of action does not state facts sufficient to entitle the plaintiff to any relief against the above named defendants.

V

That the Court erred in making and entering the decree of May 8th, 1928, and decree of June 7, 1928, amending the same, dismissing the bill of complaint and the cause of action herein and denying petition for interlocutory injunction.

VI

That the Court erred in holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, do not regulate and burden plaintiff's business of conducting interstate commerce in violation of its right guaranteed to it in Article 1, Section 8, Paragraph 4 of the Constitution of the United States.

VII

That the Court erred in holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, do not deprive the plaintiff of its property without due process of law and deny to it the equal protection of the law as guaranteed by the 14th Amendment of the Constitution of the United States.

VIII

That the Court erred in holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, which levy a tax on authorized capital stock of a foreign corporation irrespective of the amount issued are not violative of the equal protection clause of the Federal Constitution, and do not abridge the corporation's privileges and immunities as a citizen.

[fol. 55] IX

That the Court erred in not holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, are contrary to and in violation of Section 1 of the 14th Amendment and Article 1, Section 8, Paragraph 4 *to* the Constitution of the United States.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, plaintiff presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws and statutes of the United States in such cases made and provided, and plaintiff prays that said decree of May 8th, 1928, and decree of June 7th, 1928, amending the same, be reversed, set aside and held for naught.

E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Thos. Creigh, J. Harry Covington, Solicitors for Plaintiff.

Due, regular and timely service of the foregoing Assignment of Errors is hereby acknowledged this 7 day of June, 1928.

John H. Dunbar, Attorney General. L. B. Donley, Assistant Attorney General.

[File endorsement omitted.]

[fol. 56] In United States District Court

[Title omitted]

Petition for Appeal—Filed June 7, 1928

The above named, The Cudahy Packing Company, feeling itself aggrieved by the decree rendered in the above entitled cause on the 8th day of May, 1928, and decree of June 7, 1928, amending the same, denying to plaintiff an interlocutory injunction and dismissing the bill of complaint and cause of action in said cause, does hereby ap-

peal from said decree to the Supreme Court of the United States and prays that this, its appeal, may be allowed and that a transcript of the records and proceedings in said cause and all things concerning the same on which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by said The Cudahy Packing Company may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Thos. Creigh, J. Harry Covington, Solicitors for Plaintiff.

Due, regular, and timely service of the foregoing Petition is hereby acknowledged this 7 day of June, 1928.

John H. Dunbar, L. B. Donley, Assistant Attorney General, Solicitors for defendants.

[fol. 57] [File endorsement omitted.]

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 7, 1928

It is hereby ordered that the appeal prayed for by the above named plaintiff in the above entitled cause to the Supreme Court of the United States be, and the same is hereby, allowed as prayed.

Done in open court this 7th day of June, 1928.

Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

Due, regular and timely service of the foregoing Order is hereby acknowledged this 8 day of June, 1928.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Solicitors for defendants.

[File endorsement omitted.]

[fols. 59 & 60] Order fixing amount of bond on appeal, filed June 7, 1928, omitted in printing.

[fols. 61-63] Bond on appeal for $500.00, approved and filed June 7, 1928, omitted in printing.

[fols. 64 & 65] Citation, in usual form. showing service on John H. Dunbar et al., filed June 7, 1928, omitted in printing.

[fol. 66] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed June 7, 1928

To the Clerk of the above-entitled court:

Please make and certify on appeal to the Supreme Court of the United States a record which includes the following files, to wit:

1. Bill of complaint.
2. Subpoena and Marshal's return thereto.
3. Order fixing date of hearing on plaintiff's petition for an interlocutory injunction, and return of service thereon.
4. Motion of defendants to dismiss plaintiff's bill of complaint.
5. Decree of May 8, 1928, and amendatory decree of June 7, 1928, denying interlocutory injunction and dismissing bill of complaint.
6. Opinions of Judges.
7. Assignment of errors.
8. Petition for allowance of appeal.
9. Order allowing appeal.
10. Order fixing amount of bond on appeal.
11. Bond on appeal.
12. Citation.

13. Acceptance of service.

14. This præcipe and acknowledgment of service hereto attached.

E. B. Palmer, Thos. M. Askren, L. W. Brethorst, Thos. Creigh, J. Harry Covington, Solicitors for Plaintiff.

Due, regular and timely service of the foregoing præcipe is hereby acknowledged this 7 day of June, 1928.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Solicitors for Defendants.

[fol. 67] [File endorsement omitted.]

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed July 16, 1928

Comes now the appellant in the above entitled cause and state that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. That the District Court of the United States erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not regulate and burden appellant's business in interstate commerce in violation of Ar-
[fol. 70] ticle 1, Section 8, paragraph 4 of the Constitution of the United States, and that the alleged fees or taxes threatened to be imposed upon appellant by the pretended authority of said statute were not unlawful by virtue thereof.

Point II. That the District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by imposing a tax upon the property of appellant beyond the jurisdiction of the State of Washington.

Point III. That the District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deny to appellant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States by arbitrarily and unreasonably imposing a tax upon the authorized but unissued capital stock of appellant.

Point IV. The District Court erred in denying the petition for an interlocutory injunction and in dismissing the [fol. 71] bill of complaint and in not granting said interlocutory injunction.

And the appellant further states that the whole of the record, as filed, is necessary for the consideration of the case, said record as filed consisting of the following:

Bill of Complaint.
Subpœna and Marshal's return thereto.
Order Fixing date of hearing on plaintiff's petition for an interlocutory injunction, and return of service thereon.
Motion to dismiss plaintiff's bill of complaint.
Decree of May 8, 1928, dismissing bill of complaint.
Opinion of Judges.
Decree of June 7, 1928, amending decree of May 8, 1928, and denying petition for an interlocutory injunction.
Assignment of errors.
Petition for allowance of appeal.
Order allowing appeal.
Order fixing Amount of Bond on Appeal.
Bond for costs on appeal.

[fol. 72] Citation on appeal.
Præcipe.

E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Thos. Creigh, J. Harry Covington, Counsel for Appellant.

Due, regular, and timely service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged this 10th day of July, 1928.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Counsel for Appellees.

[fols. 73-74] [File endorsement omitted.]

Endorsed on cover: File No. 33,587. D. C. U. S. Western Washington. Term No. 278. The Cudahy Packing Company, a corporation, appellant, vs. Jay Grant Hinkle, Secretary of State, and John H. Dunbar, Attorney General, of the State of Washington. Filed July 16th, 1928. File No. 33,587.